

5 DEWITT LAMBERT, )  
6 Plaintiff, )  
7 vs. ) No. C 17-05369-VC  
8 TESLA, INC., )  
9 Defendant. )

11 San Francisco, California  
Thursday, December 21, 2017

13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND  
RECORDING 10:08 - 10:32 = 24 MINUTES

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1 Thursday, December 21, 2017

10:08 a.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oo--

4 THE CLERK: Calling case number 17-CV-05369,  
5 Lambert versus Tesla, Inc.

6 Counsel, please step forward and state your appearances  
7 for the record.

8 MS. OCHS: Good morning, your Honor. Danielle  
9 Ochs on behalf of Tesla.

10 THE COURT: Good morning.

11 MR. ORGAN: Good morning, your Honor. Larry Organ  
12 for the plaintiff, Mr. Lambert.

13 THE COURT: Good morning.

14 Okay. So I guess one question is, I just learned that  
15 plaintiff is attempting to file an amended complaint.

16 MR. ORGAN: Yes, your Honor.

17 THE COURT: Last night?

18 MR. ORGAN: Yes, your Honor. I have a copy of it  
19 for the Court.

20 THE COURT: But under the rules, you're not  
21 allowed to file an amended complaint at this time without  
22 seeking leave, are you?

23 MR. ORGAN: My understanding is we can because  
24 there hasn't been an answer filed.

25 THE COURT: I thought that the rule was that you

1 could only file an amended complaint as a matter of course  
2 in response to a motion to dismiss if you do so within 21  
3 days of the filing of the motion to dismiss.

4 MR. ORGAN: Well, your Honor, if -- I didn't read  
5 that part of the rule. If that's true, then I apologize,  
6 your Honor. We would seek leave to amend.

7 We only sought leave to amend so that we would clarify  
8 the relief that we are actually seeking in this proceeding.

9 THE COURT: Yes, I was going to ask how you --  
10 what is the difference between the amended complaint that  
11 you tried to file last night and the complaint that is  
12 currently on file.

13 MR. ORGAN: Sure. So what we wanted to clarify is  
14 that we do see some ambiguity in terms of the case law  
15 relative to whether or not we're seeking the same relief in  
16 the state court action or this action. So we are seeking --  
17 and I apologize, your Honor, if we violated a rule. Somehow  
18 I missed that, so that was my fault.

19 But we're seeking to only ask for injunctive relief in  
20 this Court and then also the declaratory judgment. So only  
21 equitable that --

22 THE COURT: And what are you trying to get around  
23 by only seeking injunctive relief?

24 MR. ORGAN: So that there's no duplication of  
25 what's going on in the arbitration in terms of the relief

1 that's being sought there versus the relief that's being  
2 sought with this Court.

3 THE COURT: So you think that by refraining from  
4 seeking certain relief in the state court action and  
5 refraining from seeking certain relief in this action you  
6 can avoid any arguments that the suits are duplicative?

7 MR. ORGAN: Well, I don't think that the case  
8 turns on whether they're duplicative or not because there's  
9 concurrent jurisdiction, so the state has jurisdiction over  
10 its claims and the federal court has jurisdiction over its  
11 claims. So it's not dispositive.

12 THE COURT: Well, maybe we can cut through this.

13 MR. ORGAN: Yes.

14 THE COURT: I mean I think the problem you have is  
15 the motion to compel arbitration.

16 MR. ORGAN: The Gilmer analysis, your Honor.

17 THE COURT: And I -- you know, my concern here --  
18 let me pull up your file for this case.

19 You know, the concern that I have is that I tend to  
20 agree with the Ninth Circuit's analysis in Duffield, the  
21 1998 case. My view of it, for what it's worth -- and it's  
22 worth nothing I think at this point -- is that it is unclear  
23 what that language means, "encouraging alternative dispute  
24 resolution" and what that language was meant to apply to.

25 And so you ought to look to legislative history to try

1 to figure that out. And it struck me -- I mean I haven't  
2 done a deep dive on it, but it struck me that the analysis  
3 in Duffield, you know, which reached the conclusion that  
4 mandatory arbitration was inconsistent with the goals of the  
5 statute was correct.

6 But we have this later Ninth Circuit en banc decision.

7 MR. ORGAN: Luce?

8 THE COURT: Luce. Luce Forward. And the en banc  
9 court came out a different way. I tend to disagree with the  
10 analysis in Luce Forward, but it's the analysis that binds  
11 me. And I understand that this is a section 1981 claim, not  
12 a Title VII claim, but the analysis, it seems to me, applies  
13 squarely.

14 And so I don't see how -- I think that Ninth Circuit  
15 precedent basically compels me to compel arbitration in this  
16 case, even though I disagree with the Ninth Circuit  
17 precedent.

18 So what is your basis for -- what would be the basis  
19 for distinguishing the Luce Forward case and the -- what  
20 would be the basis for concluding that the Luce Forward  
21 analysis doesn't apply here?

22 MR. ORGAN: Several reasons, your Honor, two major  
23 ones.

24 Number one, Luce focused on Title VII and --

25 THE COURT: Well, I understand that, but the

1 question is what -- why would the analysis be different  
2 here?

3 MR. ORGAN: Several reasons why there are  
4 differences.

5 First of all, the Civil Rights Act of 1866 was passed  
6 before the FAA, and Title VII was passed after FAA. And  
7 what the Luce court reasoned was that surely Congress when  
8 it passed Title VII took into account the FAA. And so it  
9 had to incorporate those provisions. There --

10 THE COURT: Yeah, but this language encouraging  
11 alternative dispute resolution was adopted when?

12 MR. ORGAN: That was adopted in 1991, the Civil  
13 Rights Act of 1991.

14 THE COURT: So that was after the FAA was enacted,  
15 right?

16 MR. ORGAN: That's correct, but --

17 THE COURT: So I mean why doesn't that concept  
18 apply here also?

19 MR. ORGAN: Because all that Congress was doing at  
20 that time was saying -- essentially codifying the Gilmer  
21 three-part analysis. And when you do the Gilmer three-part  
22 analysis in this case to section 1981 claims, it's clear  
23 that the Court's inclination to not rule for arbitration is  
24 supported by Gilmer because it tells you you have to look to  
25 the legislative history.

1       And when you look to the legislative history of section  
2 1981, it's clear that the Reconstruction Congress did not  
3 intend to have those claims subject to an arbitration-like  
4 setting like the Freedmen's Bureaus.

5       And when you take that into --

6           THE COURT: I mean I think that's true, but I  
7 think the -- doesn't the Luce Forward case stand for the  
8 proposition that whatever the Reconstruction Congress  
9 intended, Congress in 1991 intended for these claims to  
10 be -- Title VII claims and 1981 claims and whatever other  
11 claims are covered by this language to be arbitrated.

12         Again, I disagree with it, but I think that's what the  
13 Ninth Circuit -- the Luce Forward decision stands for.

14           MR. ORGAN: Luce Forward does not stand for -- and  
15 I'm not criticizing the Court here, your Honor. I think --  
16 I'm just asking the Court to perhaps look at it from a  
17 different perspective, and that is Luce Forward notes  
18 that -- Mr. Baron just passed me something so I'm -- if you  
19 look at the language in section 118, it says "where  
20 appropriate and to the extent authorized by law." That's  
21 what Gilmer tells us we have to do.

22         And so in so opining, the Luce court is essentially  
23 saying look to Gilmer, when you apply the Gilmer -- it's not  
24 changing, it's not changing the situation prior to the  
25 passage in 1991. Essentially, it's codifying the law that

1 already existed pursuant to Gilmer.

2       If the Court finds in applying the Gilmer standards  
3 that arbitration is appropriate, then the Court should rule  
4 that arbitration is there.

5       But what plaintiff is positing is that based on the  
6 legislative history of section 1981 and the fundamental  
7 purposes of section 1981, that the Court should -- applying  
8 that Gilmer analysis, relying on the language that Congress  
9 itself said, "where appropriate and to the extent authorized  
10 by law" -- if the Court applies that language and then does  
11 the correct legislative history analysis pursuant to  
12 Gilmer -- which isn't challenged by the defendant here in  
13 any of their papers in terms of what the meaning of the  
14 legislative history is.

15       But if the Court does that analysis, that Gilmer  
16 analysis, which is codified, the Court will come to the  
17 conclusion that the plaintiffs have put forward, which is  
18 section 1981, apart from Title VII and the other statutes  
19 that are encompassed by the EEOC formula, because those took  
20 place after the FAA -- if the Court engaged in that  
21 analysis, the Court will actually come down on the side of  
22 plaintiffs here and find that arbitration is inappropriate  
23 in section 1981 cases.

24       And in fact, that's one of the things that we seek in  
25 this case, is a ruling by the Court that says specifically

1 that 1981 cases are not arbitrable.

2 THE COURT: Okay. Any other arguments you want to  
3 make in support of the idea that the Luce Forward analysis  
4 doesn't apply to 1981 claims?

5 MR. ORGAN: The only other thing, there are some  
6 cases I know that were cited by the defendant in their  
7 papers. I think we distinguish those cases. But in terms  
8 of the Luce analysis, your Honor, I think that there is this  
9 fundamental difference structurally in terms of Title VII  
10 versus section 1981 cases.

11 Even though they fall under the rubric of civil rights  
12 statutes, because of the time that they were passed and the  
13 direct congressional intent at that time and the fact that  
14 Title VII has the EEOC to enforce it, those make section  
15 1981 claims, even though they're on the same level as Title  
16 VII claims, fundamental different.

17 And so I think that the Court could rule -- still  
18 within the guidelines of Luce, pursuant to the Gilmer  
19 factors, could rule in favor of the plaintiff, your Honor.

20 THE COURT: All right.

21 MS. OCHS: Your Honor, we disagree. We think that  
22 Luce does apply.

23 The analysis in section 118, there's nothing in Luce  
24 that would suggest that its detailed analysis of the  
25 operation of section 118 would not apply to 1981 claims.

1       And I think that when you do apply the Gilmer analysis,  
2 we reach a different conclusion. We do disagree with what  
3 they extract from the legislative history of the 1866 Act.

4       First, we think that per Luce, it's inappropriate to go  
5 back that far when we have text of an act passed in 1991  
6 after the enactment of the FAA that clearly states,  
7 unambiguous, that it's encouraging arbitration. There's no  
8 ambiguity there. There's just one phrase that you indicated  
9 might be --

10       THE COURT: I think there -- I don't know how far  
11 you're going to get arguing to me that there's no ambiguity.

12       MS. OCHS: Okay. With --

13       THE COURT: I think that the phrase -- like I  
14 said, as the Court did in Duffield, I mean I think that that  
15 phrase could be interpreted as, you know, encouraging  
16 voluntary arbitration or it could be interpreted as  
17 contemplating mandatory arbitration. I don't think the  
18 language is clear, and I don't really see how the Ninth  
19 Circuit in Luce Forward concluded that the language clearly  
20 said one thing or the other.

21       MS. OCHS: Okay. Well, me turn to --

22       THE COURT: That's what it said.

23       MS. OCHS: Right. I think we do disagree on  
24 whether or not the language is clear.

25       But let me just turn to another point with respect to

1 the 1966 Act. Counsel's referred to the congressional  
2 intent there, what Congress intended with respect to these  
3 claims. What are these claims.

4 The claims in this lawsuit relate to alleged employment  
5 discrimination based on race, private employment  
6 discrimination based on race. That claim didn't exist in  
7 1866. That claim didn't exist until 1968, I think it was,  
8 with the -- I'll have to look up the name of the case. It  
9 begins with a "J" -- that held that the corollary, 1982  
10 which relates to housing discrimination, applied to private  
11 actors, not just government actors.

12 And up until that point in time -- and I will call that  
13 case up for you. Up until that point in time it wasn't  
14 known to the world that the Reconstruction Era statutes  
15 applied to private conduct, so certainly not to private  
16 employment.

17 And it wasn't until 1975 in the Supreme Court case -- I  
18 think it's Johnson, I can get you that name too -- where the  
19 court held, yes, in fact it applies to private employment  
20 discrimination. It sort of announced that standard at the  
21 highest levels because some lower courts had been tinkering  
22 with it but no Supreme Court had actually acknowledged that  
23 development. That's a hundred years after.

24 So to focus extensively on the congressional intent in  
25 1866 when the intent did not include using 1981 for private

1 employment discrimination claims doesn't seem to me to make  
2 a whole lot of sense when faced with much more current  
3 legislation in 1991 in which the Congress, in our view, made  
4 clear -- it certainly expressed an interest in using  
5 arbitration in race employment discrimination claims.

6 So we would contend that that legislative history is  
7 not the central point of this case.

8 Also, with respect to plaintiff's argument that somehow  
9 arbitrating 1981 claims prevents the government from  
10 enforcing the rights that, for example, it can enforce in  
11 Title VII claims because there's an administrative scheme,  
12 that's one of their arguments. We don't agree with that.

13 One, the issues -- the rights at issue are the right to  
14 be free from alleged employment discrimination based on  
15 race. That's the right. That right is protected both by  
16 1981 and by Title VII. Should an employer engage in conduct  
17 that violates that right, either the federal agency, EEOC,  
18 or the state agency-- both have the ability, power and  
19 authority to go attack that conduct.

20 The fact that they're not using section 1981 to do so  
21 is irrelevant. There's nothing about allowing arbitration  
22 of 1981 claims that prevents government agencies from  
23 attacking the behavior that is protected by 1981 claims by  
24 using other statutory schemes.

25 The other thing that I would argue here is that the

1 arguments that plaintiff has against arbitration itself, why  
2 arbitration would not be fair in a 1981 claim, plaintiff  
3 fails to distinguish why 1981 claims would somehow be harmed  
4 much more significantly than all the other claims that  
5 courts have ordered to arbitration, which include Title VII  
6 pursuant to Gilmer, the ADEA, the Equal Pay Act -- I'm  
7 sorry. Title VII is pursuant to Luce.

8 THE COURT: It's equally bad in this context --

9 MS. OCHS: Right.

10 THE COURT: -- as other contexts.

11 MS. OCHS: And we --

12 THE COURT: But not worse.

13 MS. OCHS: We have authority that shows that Title  
14 VII, ADEA, EPA, FMLA and FEHA have all been ordered to  
15 arbitrate mandatory arbitration clauses. And plaintiff has  
16 the burden here. And plaintiff has failed to show why 1981  
17 claims are so special and so different that they ought to be  
18 treated differently than all of the other civil rights  
19 statutes.

20 THE COURT: Okay. I understand your arguments. I  
21 assume that if I conclude that I'm compelled to compel  
22 arbitration, I should just deny the -- if I could construe  
23 this filing of the amended complaint as a request, as a  
24 motion for leave to file an amended complaint and deny it as  
25 moot, right?

1 MR. ORGAN: That's correct, your Honor.

2 THE COURT: Okay.

3 MS. ORGAN: Your Honor, could I just add --

4 THE COURT: Last word?

5 MR. ORGAN: -- a couple things?

6 THE COURT: Yes.

7 MR. ORGAN: Yes, your Honor.

8 So Duffield specifically stated that 118 did not --  
9 that Gilmer was not incorporated in 118. And that's what  
10 Luce overturned when it overturned Duffield. However, it  
11 didn't go into -- Luce did not really go into whether or not  
12 the Duffield factor -- strike that -- whether or not the  
13 three factors should not be applied from Gilmer.

14 And respectfully on that point, we think that once you  
15 get to that Duffield analysis and you have to then go to the  
16 legislative history, that is something that has not been  
17 analyzed by any other court. And if this Court engages in  
18 that analysis, it will find in favor of the plaintiff.

19 And there is a difference, respectfully, between  
20 section 1981 and Title VII. And the difference is section  
21 1981 was passed after 600,000 Americans died in the Civil  
22 War. This was the most fractious point in American history,  
23 and so there is a difference between that statute and Title  
24 VII.

25 And finally on 118. If --

1           THE COURT: If I could just ask you a question  
2 about that.

3           MR. ORGAN: Yes.

4           THE COURT: But the point of Luce Forward is  
5 legislative history should not be relied on to establish  
6 that Congress intended to preclude waiver of a judicial  
7 forum in derogation of a clear and unambiguous statute. I  
8 mean it's saying that the language of section 118 is clear  
9 and unambiguous and it precludes a finding that Congress  
10 intended to bar arbitration.

11           MR. ORGAN: I think it precludes a finding that  
12 Congress intended to bar arbitration, that's correct. It  
13 doesn't, though, incorporate the converse of that.

14           So if that's the case -- and just let me --

15           THE COURT: Right. But the FAA --

16           MR. ORGAN: I know that's very unclear, your  
17 Honor. Let me -- I think I could --

18           THE COURT: No, no. I think I understand what  
19 you're saying, but the FAA is what finishes the job.

20           MR. ORGAN: Except if Congress had intended that,  
21 they would have made a per se rule in section 118 of the  
22 1991 Act. They would have said per se that these things are  
23 arbitrable. But they didn't make that. They relied on this  
24 vaguer language, and it's that vaguer language that actually  
25 comes from Gilmer. And therefore, because it comes from

1 Gilmer and is based on Gilmer, therefore you have to do the  
2 Gilmer analysis. Therefore, you can rely, your Honor, on  
3 the legislative history.

4 And if you go to the legislative history of section  
5 1981, it's clear that there were private employers back  
6 then. They were called slave holders. And once they could  
7 no longer own their former property, that was private  
8 employment relations.

9 That specifically what section 1981's designed to  
10 address, because the Freedmen's Bureaus weren't handling  
11 that particular economic problem at that time. And they  
12 were perpetuating the racist tendencies that were happening  
13 prior to that under slavery. And so that's why Congress  
14 specifically put forward section 1981, to address this  
15 issue.

16 So how can we put them back? How does it comport with  
17 that prior legislative history? The purpose of -- the very  
18 purpose of that statute, to permit new employers to  
19 essentially engage in similar conduct where they have  
20 one-sided contracts that the employees have to sign and are  
21 forced into that particular relationship. That's what  
22 they're saying in 1866 is impermissible.

23 So if you do the Gilmer analysis and you go back to  
24 that history, it's clear that section 1981 is different than  
25 Title VII and in that way, I think even under Luce, this

1 Court should rule in favor of the plaintiff.

2 THE COURT: Okay.

3 MS. OCHS: Your Honor --

4 THE COURT: I understand the arguments, and I'll  
5 issue a ruling shortly. Thank you.

6 MR. ORGAN: Thank you, your Honor.

7 (Proceedings adjourned at 10:32 a.m.)

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Tara Begum

16 | Echo Reporting, Inc., Transcriber

Thursday, March 8, 2018